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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WENDY CHOWNING and LOURDES CASAS, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

KOHL'S DEPARTMENT STORES, INC., a Delaware Corporation; KOHL'S CORPORATION; and DOES 1 through 20, inclusive,

Defendants.

CASE NO. 2:15-cv-8673-RGK-SP

CLASS ACTION

JOINT STIPULATION RE: PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

DISCOVERY MATTER

Date: January 26, 2016
Time: 9:30 a.m.
Magistrate Judge: Sheri Pym
Courtroom: 3 or 4 – 3rd Floor
Discovery Cut-Off: None Set
Trial Date: None Set
Pre-Trial Conference Date: None Set

This Joint Stipulation is submitted pursuant to Local Rule 37-2 in connection with Plaintiff Wendy Chowning's ("Plaintiff" or "Chowning") motion to compel Defendant Kohl's Department Stores, Inc. to produce documents responsive to Plaintiff's Request for Production of Documents, Set One. The parties have met and conferred in good faith to resolve this dispute, but were unable to do so. Pursuant to Local Rule 37-2.1, no scheduling order has been issued, but a copy of the district court's order setting an initial case management conference is attached as Exhibit 1 to the accompanying Declaration of Matthew J. Zevin ("Zevin Decl."), and the Court's order setting a class certification briefing schedule is attached as Exhibit 2 to the Zevin Decl.

I. INTRODUCTION

A. Plaintiff's Introduction

This case arises out of Defendants Kohl's Corp. and Kohl's Department Stores, Inc.'s (collectively, "Defendants" or "Kohl's") false price comparison advertising scheme. Plaintiff generally alleges that Kohl's advertises its private and exclusive branded (sold "only at Kohl's") products with both a purportedly discounted "sale" price and a false and misleading "regular" price that are collectively designed to create the impression that each product is regularly offered and sold at, (and therefore worth), more than the deeply discounted "sale" price. Since Kohl's rarely, if ever, offers or sells products at the fictitious "regular" price, consumers do not receive the discount that Kohl's promises.

Plaintiff brings claims under California's: Unfair Competition Law, Bus. & Prof. Code §§ 17500, et seq. (the "UCL"), False Advertising Law, Bus. & Prof. Code §§ 17501 ("FAL"), section 1770(a)(13) of the Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, et seq. ("CLRA"), and the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) ("FTCA"), which is incorporated under the UCL.[1]

[1] The complaint was filed on behalf of two Plaintiffs, Ms. Chowning and

Plaintiff seeks to represent a class, currently defined as: "All persons who, while in the state of California and between July 21, 2011 and the present, purchased from Kohl's one or more private or exclusive branded items advertised at a discount of 30% or more from a stated "original" or "regular" price and who have not received a refund or credit for their purchase(s)."[2]

Plaintiff alleges that she purchased at least two private or exclusive branded products in reliance on the purported discount, which was represented to be the difference between the stated original price and the promised sale price. Specifically, she purchased a Jennifer Lopez (a Kohl's exclusive brand) Dress advertised with an original price of $70.00 on sale for 70% off at $21.00. Dkt. No. 1 at ¶31. Later, Plaintiff purchased a Sonoma Life+Style (a Kohl's private label brand) Robe that was advertised as having a 40% discount ($46.00 regular price on sale for $26.99). *Id.* at ¶32. In discovery, Plaintiff has provided Kohl's with receipts demonstrating at least two additional purchases relevant to this lawsuit, and she is amending her complaint to include such transactions.

This case was originally filed in the Southern District of California but was transferred to this Court upon motion by Kohl's. Dkt. Nos. 20-21. Upon transfer, Plaintiff immediately moved for relief from Local Rule 23-3 in order to provide sufficient time to conduct discovery prior to moving for class certification. Dkt. No. 26; Zevin Decl. ¶4. The Court denied such relief and ordered that Plaintiff's motion for class certification be filed by February 2, 2016, which is 90 days after the date of transfer. Dkt. No. 29; Zevin Decl. Ex. 2. Accordingly, Plaintiff wasted no time in serving discovery. At Plaintiff's request, the Parties conducted their Rule 26 meeting on November 11, 2015, which was before the Court issued an order setting the initial case management

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Lourdes Casas. Dkt. No. 1. However, Ms. Casas is withdrawing as a named plaintiff, and any discovery disputes concerning Ms. Casas or her transactions are therefore moot.

[2] *See* Complaint [Dkt. No. 1] at ¶36.

conference. Zevin Decl. 5. Two days later, on November 13, 2015, Plaintiff served Kohl’s with her Request for Production of Documents, Set One (“RFP”). *Id.* at ¶5 and. Ex. 3. On December 16, 2015, (thirty plus 3 days later), Defendant served nothing but boilerplate objections and responses in which it flatly refused to produce the vast majority of responsive documents and indicated that it would “endeavor” to produce the few documents it would agree to produce by February 2, 2016. Zevin Decl. ¶6 and Ex. 4 at General Objection 2. Not coincidentally, this is the same day that Plaintiff’s class certification motion is due. The day after receiving Defendant’s response and objections, Plaintiff served Kohl’s with a letter identifying the issues in dispute and requested to meet and confer within 10 days pursuant to Local Rule 37-1. Zevin Decl. ¶7 and Ex. 5. Kohl’s agreed to meet and confer on the tenth day, December 28, 2015. Zevin Decl. ¶7.

During the meet and confer, the parties discussed several potential compromises that would significantly limit the scope of Defendant's production. Zevin Decl. ¶8. Most notably, Plaintiff proposed that Kohl’s should initially limit its production to responsive documents related to the private and/or exclusive branded products purchased by Plaintiff (the two items described in the complaint as well as those identified in receipts that she produced to Kohl’s) and, if the case is certified as a class action, the parties would meet and confer on the broader requests pertaining to *all* private and exclusive branded products sold in California during the class period. *Id*. Plaintiff’s proposal is designed to (and will) significantly reduce the time and expense necessary for Kohl’s to complete its production prior to class certification. While Kohl’s counsel stated that he would discuss this compromise with his clients, Kohl’s has, to date, not committed to it. *Id*. Unfortunately, there also remain several other discovery requests which Defendant continues to refuse to respond to with anything but objections.

Despite follow up communications, Kohl's has, to date, failed to produce a single document; and it still has not committed to produce any documents in advance of Plaintiff's deadline to move for class certification. *See* Zevin Decl. ¶¶ 7-12 and Exs. 6, 7 and 8. Defendant’s calculated delay in producing responsive documents, as well as its continued reliance on boilerplate objections, are without merit and risk imposing severe prejudice on Plaintiff. Indeed, Kohl's has recently opposed class certification in another very similar case based on the argument that counsel are "inadequate" under Rule 23(a)(4) because the plaintiff's motion was devoid of the “evidentiary proof” required for class certification. Zevin Decl. ¶13 and Ex. 9 at pages 12-14, 25. Kohl’s seems to be trying to manufacture the same argument here by improperly withholding relevant documents and delaying its production.

B. Defendant’s Introduction

Plaintiff Wendy Chowning filed this purported consumer class action against Kohl’s, a national department store, alleging that Kohl’s has violated California’s Unfair Competition Law (“UCL”), California’s False Advertising Laws (“FAL”), and the Consumer Legal Remedies Act (“CLRA”) by “inflat[ing]” its “original” and/or “regular” prices in order to make its sales prices appear more attractive. Complaint at ¶ 24. Plaintiff claims that she relied on this advertising “in deciding to make” purchases from Kohl’s. *Id.* at ¶ 20. Plaintiff alleges that she purchased a dress “‘on sale’ for $21.00” in reliance on an advertisement falsely stating an advertised former price of $70.00. *Id.* at ¶ 31. She further alleges that she paid $26.99 for a robe in reliance on an advertisement falsely stating an advertised former price of $46.00. *Id.* at ¶ 32. Plaintiff seeks to represent, “[a]ll persons who, while in the state of California and between July 21, 2011 and the present, purchased from Kohl’s one or more private or exclusive branded item advertised at a discount of 30% or more from a stated ‘original’ or ‘regular’ price and who have not received a refund or credit for their purchase[s].” *Id.* at ¶ 36.

Plaintiff served her RFPs on November 13, 2015. Declaration of E. Alex Beroukhim ("Beroukhim Dec."), ¶ 2. Kohl's timely served its written responses in Mid-December 2015. *Id.* at ¶ 3. Because a number of plaintiff's document requests were overbroad, unduly burdensome, vague and/or unintelligible, Kohl's offered to meet and confer with plaintiff. *Id.* at ¶ 5. Plaintiff requested a meet and confer on December 17, 2015, and Kohl's made itself available on December 28, 2015, in the middle of the holiday season. *Id.* The parties completed their meet and confer on January 14, 2016 and were able to resolve most of their current disputes concerning plaintiff's RFPs. *Id.* at ¶ 6.

After plaintiff agreed in writing, on January 5, 2016, to abide by the terms of the stipulated protective order until such time as it was entered by the Court, Kohl's began making its rolling productions in response to the RFPs. *Id.* at ¶¶ 7-8. More specifically, on January 6, 2016, Kohl's produced 338 pages of substantive documents responsive to plaintiff's RFPs. *Id.* at ¶ 8. Kohl's is working diligently to collect, review and process further documents for production, and will continue producing these documents on a rolling basis. *Id.*; *see* Order Granting in Part and Denying in Part Ex Parte Application to Shorten Time (Dkt. No. 39) ("[I]t appears both parties have worked diligently on this matter.").

REQUESTS FOR PRODUCTION AT ISSUE

General Objection No. 1

Defendant's General Objection No. 1 states:

Kohl's objects to the date and location designated by plaintiff for production of documents. The Requests seek numerous categories of documents that require significant collection and review to produce to plaintiff, and it would be unduly burdensome to produce documents as demanded in the Requests. Accordingly, Kohl's will endeavor to produce the requested documents by February 2, 2016.

Plaintiff's Contentions with Respect to General Objection No. 1

As Kohl's knows, February 2, 2016 is the deadline for Plaintiff to file her motion for class certification, and the Court has already rejected her request to extend that deadline. Meanwhile, in a separate but similar case, Kohl's has argued that other class counsel are "inadequate" for failing to support their motion for class certification with "evidence." Zevin Decl. Ex. 9 at pages 12-14, 25. Kohl's seems to be trying to manufacture the same argument here by improperly withholding relevant documents and delaying its production of relevant evidence until after the deadline for Plaintiffs' motion. Plaintiff served her document request in mid-November, and Kohl's has no valid justification for delaying its production.

Kohl's also has not supported its claim of "undue burden" with any evidence. Objections based on burden that are unsupported and unspecific should be rejected. *See In re Toys R Us-Delaware, inc. Fair and Accurate Credit Transaction Act (FACTA) Litig.*, No. ML 08-1980 MMM(FMOx), 2010 WL 4942645, at *5 (C.D. Cal. July 29, 2010). Moreover, Plaintiff has proposed a compromise that would significantly reduce the scope of Kohl's production, at least in the short term, yet Kohl's has not even responded whether it will accept that proposal, let alone completed the appropriate production.

Defendant's counsel also stated in the meet and confer on December 28, 2015 that Kohl's would agree to a "rolling production" as soon as a protective order is entered by the Court, but would not agree to a final deadline sufficiently in advance of Plaintiff's February 2, 2016 deadline to file a motion for class certification.[3] Zevin Decl. ¶8. In response, Plaintiff agreed to abide by the terms of the proposed protective order even before it is entered, yet Defendant still refuses to make a timely production. *Id.* at ¶8 and ¶11. Defendant provides no rationale for its continued delay and it can only be surmised that it intends to deprive Plaintiff of the very evidence that will support her motion for class certification. Production is already overdue and should be compelled forthwith.

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[3] The parties previously agreed to a stipulated protective order, which was "lodged" by Kohl's. Dkt. No. 35. To date, the Court has not acted on protective order, and Plaintiff questions whether Kohl's properly presented it to the Court by way of a Notice of Lodging.

Defendant's Contentions with Respect to General Objection No. 1

Plaintiff's contention that Kohl's is attempting "to deprive Plaintiff of the very evidence that will support her motion for class certification" is flatly contradicted by the record. Kohl's has committed to completing its production in response to Plaintiff's RFPs by February 2, 2016. Kohl's has clarified that it will produce documents responsive to the RFPs on a rolling basis, and that it will work in good faith to complete its production in advance of the February 2, 2016 deadline to the extent reasonably possible. Beroukhim Dec. at ¶ 4. Kohl's is currently in the process of doing just that. *Id.* at ¶ 8.

Kohl's was clear during the meet and confer process that it could not produce responsive documents, many of which are highly competitively-sensitive, without protections that would adequately ensure their confidentiality. *Id.* at ¶ 7. A protective order was not entered in this matter until January 7, 2016, and plaintiff did not confirm in writing until the evening of January 5, 2016 that she would agree to be bound by the stipulated protective order until such time as it was entered by the Court. *Id.* at ¶ 7. Kohl's made its first production less than 24 hours thereafter, on January 6, 2016. *Id.* at ¶ 8. Accordingly, although plaintiff asserts that Kohl's "provides no rationale for its continued delay," Kohl's did not produce documents before January 6, 2016 because doing so would have compromised the confidentiality of its documents. Moreover, Kohl's is currently working diligently to collect, review and process further responsive documents for production, and will continue to produce these documents on a rolling basis. *Id.* at ¶ 8; *see* Order Granting in Part and Denying in Part Ex Parte Application to Shorten Time (Dkt. No. 39) ("[I]t appears both parties have worked diligently on this matter.”).

General Objections Nos. 12, 16, 17 and 18

12. Kohl’s objects to each request, instruction, and definition to the extent that it is overbroad insofar as it requests data regarding items not purchased by plaintiff[], stores not shopped at by plaintiff[], or periods during which plaintiff[] did not buy items from Kohl’s.

16. Kohl’s objects to the definitions of “Policy” and “Policies” as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant evidence proportional to the needs of the case to the extent that they refer to information regarding items not purchased by plaintiff[], stores not shopped at by plaintiff[], or periods during which plaintiff[] did not buy items from Kohl’s. Therefore, all requests that use the term “Policy” or “Policies” will be interpreted as requesting information regarding items purchased by plaintiff[], stores shopped at by plaintiff[], or periods during which plaintiff[] bought items from Kohl’s.

17. Kohl’s objects to the definition of “Store” as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant evidence proportional to the needs of the case to the extent that it requests information regarding stores not shopped at by plaintiff[]. Therefore, all requests that use the term “Store” will be interpreted as requesting information regarding stores shopped at by plaintiff[].

18. Kohl’s objects to the definition of “Transaction” as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant evidence proportional to the needs of the case to the extent that it requests information regarding items not purchased by plaintiff[], stores not shopped at by plaintiff[], or periods during which plaintiff[] did not buy items from Kohl’s. Therefore, all requests that use the term “Transaction” will be interpreted as requesting information regarding items purchased by plaintiff[],

stores shopped at by plaintiff[], or periods during which plaintiff[] bought items from Kohl's.

Plaintiff's Contentions Regarding General Objections 12, 16, 17 and 18

Collectively, these General Objections appear designed to thwart Plaintiff's ability to obtain class discovery. This case was filed as a class action, and Plaintiff intends to prove that common issues exist and predominate under Federal Rules 23(a)(2) and 23(b)(3), and that Plaintiff's claims are typical under Federal Rule 23(a)(3). Plaintiff is entitled to seek discovery related to the proposed class and class allegations. *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 942-43 (9th Cir. 2009) ("[O]ften the pleadings alone will not resolve the question of class certification and . . . some discovery will be warranted.") (citing cases); *Nguyen v. Baxter Healthcare Corp.*, 275 F.R.C. 503, 506 (C.D. Cal. 2011 (noting that both "Supreme Court and Ninth Circuit precedent supports the right of class counsel to conduct pre-certification discovery . . ."). *See also Spann v. JCPenney Corp.*, 307 F.R.D. 508, 518 (C.D. Cal. 2015) (citing classwide evidence used to show that false price comparison advertising was a common "scheme" that was "rampant throughout California as part of a massive, years-long pervasive campaign and was consistent across all of J.C. Penney's private branded and exclusive branded [products].").

Simply put, Plaintiff intends to obtain the same type of evidence that was submitted and relied upon in the *Spann* case to establish commonality, typicality and predominance, and this includes details of all California-based transactions concerning the products purchased by plaintiff, as well as the pricing policies and price-offering histories of such products at all California stores (and California internet transactions). *Spann*, 307 F.R.D. at 516 (citing expert analysis of sales data that is relevant to "a number of issues related to class certification"); *id.* at 518 (citing additional evidence showing that products were rarely, if ever, offered at regular price).

Plaintiff's request for production seeks a variety of similar documents in this case both for the specific products purchased by Plaintiff as well as for all class-wide products. During the meet and confer process, however, Plaintiff offered a significant compromise by which Kohl's would initially produce documents related only to the specific products purchased by Plaintiff and refrain from the larger production until after a class is certified. Kohl's has responded that it would consider this proposal but, to date, has not accepted it. In the meantime, no documents have been produced and the deadline for Plaintiff to file her motion for class certification continues to grow closer, all to the prejudice of Plaintiff.

Defendant's Contentions Regarding General Objections 12, 16, 17 and 18

The parties have reached a compromise on these Objections.

Request for Production No. 2

All Documents Concerning any research, study, analysis, report or survey Concerning retail prices, discounts, sale prices or price comparison advertising. This should include any such Documents in Kohl's possession, custody or control, regardless of whether or not they were drafted, created, prepared or produced for Kohl's.

Response to Request for Production No. 2

Kohl's hereby incorporates the Preliminary Statement and General Objections. Kohl's further objects that the request is overbroad and unduly burdensome with respect to, among other things, the products, stores, and period for which information is sought. Kohl's further objects that the request seeks information regarding products, stores, and periods, among other things, that is not relevant to any party's claims or defenses and not proportional to the needs of the case. Kohl's further objects that the request is vague, ambiguous, and unintelligible as to the terms "retail pricing," "price discounting," "price comparison" and/or "price comparison advertising policies" applicable to its

California Stores." Kohl's further objects to the extent that the request seeks trade-secret or confidential information, as no protective order is in place.

Plaintiff's Contentions with Respect to Defendant's Response to RFP 2

Plaintiff is entitled, as a matter of law, to discover "any non-privileged matter that is relevant to any party's claim or defense…Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute." Fed. R. Civ. P. 26(b)(1); *Duran v. Cisco Sys.*, 258 F.R.D. 375, 378 (C.D. Ca. 2009); *Moon v. SCP Pool Corp*., 232 F.R.D. 633, 636 (C.D. Cal. 2005). "Relevant information for purposes of discovery is information 'reasonably calculated to lead to the discovery of admissible evidence.'" *Withers. V. eHarmony, Inc.*, 267 F.R.D. 316, 319 (C.D. Ca. 2010).

Defendant, as the party resisting discovery, has "the burden to show discovery should not be allowed, and [has] the burden of clarifying, explaining, and supporting [their] objections." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). Further, boilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege." *Duran v. Cisco Sys.*, 258 F.R.D. 375 at 379. Courts do not permit a party "to avoid its obligations by filing misleading or evasive responses, or by failing to examine records within its control." *Anderson v. Cryovac, Inc.* 862 F.2d 910, 929 (1st Cir. 1988).

It is established that to state a claim under the UCL and FAL, "one need not plead and prove the elements of a tort. Instead, one need only show that "members of the public are likely to be deceived." *Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1267. Plaintiff's UCL and FAL claims necessarily raise issues as to whether Defendant's price comparison advertisements are "likely to deceive" and are material to a reasonable consumer, which present common issues for purposes of class certification. *Spann v. J.C. Penney Corp.*, 307 F.R.D. 508, 518 (C.D. Cal. 2015).

RFP 2 seeks documents that are directly relevant to these common questions in the forms of consumer studies, surveys, research and reports concerning Kohl's price comparison advertisements. Indeed, during Plaintiff's deposition, Defendant marked as an exhibit and questioned Plaintiff on some statements of consumers that were purportedly pulled from some type of survey, study or report and which addressed their reaction to Defendant's price comparison advertising. Zevin Decl. ¶14 and Ex. 10. Not only has Defendant demonstrated that it is in possession of responsive documents, but it apparently considers them relevant enough to use during its questioning of deponents. Yet, Defendant refuses to produce *all* responsive documents.

Subsequent to the meet and confer, Defendant clarified that it would "produce copies of all focus group studies concerning the pricing, labeling, marketing, and advertising of merchandise sold in California or such studies that are used by Kohl's in California." Zevin Decl. ¶10 and Ex. 7.

It is doubtful that any meaningful study would be limited to just California consumers, and Plaintiff is entitled to discover *all* relevant studies, reports, surveys or research on this issue that are in Defendant's possession. Defendant does not deny that it has other responsive documents, including consumer surveys, nor does it deny that such documents are relevant to this litigation. Kohl's should not be allowed to cherry pick which responsive documents it will produce, and Plaintiff should be entitled to the entirety of such relevant evidence to the extent that it is in Kohl's possession, custody or control.

Defendant's Contentions with Respect to Its Response to RFP 2

Plaintiff has defined the scope of this controversy. Plaintiff could have sought certification of a nationwide class. Instead, plaintiff has defined the putative class to include only individuals who purchased products from Kohl's while in the state of California. Complaint at ¶ 36. Moreover, consumer behavior and perceptions vary from population-to-population. Consumers in, for example, Maine, are not the same as consumers in California. Accordingly, information concerning areas outside of California is not relevant to this litigation.

Remarkably, plaintiff claims that "[i]t is doubtful that any meaningful study would be limited to just California consumers," but does not explain why this is so. *See Howard v. Hedgpeth*, 2010 WL 5422580, at *2 (E.D. Cal. Dec. 21, 2010) ("If Defendants object to any one of Plaintiff's discovery requests, it is Plaintiff's burden in his motion to compel to demonstrate why the objection is not justified or why the response is deficient. Plaintiff must inform the Court . . . why the information sought is relevant and why Defendant's objections are not justified or the response is not complete."). Because this suit concerns only California consumers, it is difficult to imagine how a study of those consumers would not be "meaningful." Kohl's has offered to produce studies, to the extent they exist, concerning California consumers because the putative class consists of such consumers, not because it is attempting to "cherry pick" evidence.

Request For Production No. 12

All Documents related to the ordering or purchasing from the manufacturer(s) of the products purchased by Plaintiff[] as alleged in the Complaint.

Response to Request for Production No. 12

Kohl's hereby incorporates the Preliminary Statement and General Objections. Kohl's further objects that the request is overbroad and unduly burdensome with respect to, among other things, the period for which information is sought. Kohl's further objects that the request seeks information regarding ordering and purchasing information and periods, among other things, that is not relevant to any party's claims or defenses and not proportional to the needs of the case. Kohl's further objects to the extent that the request seeks trade-secret or confidential information, as no protective order is in place. Kohl's further objects that the request is vague, ambiguous, and unintelligible as to the phrase "related to the ordering or purchasing from the manufacturer."

Plaintiff's contentions concerning RFP No. 12

During the meet and confer process, Plaintiff clarified that she seeks purchase orders or contracts for the manufacture and or supply of all class-related products that she purchased. Plaintiff believes that this documentation may be relevant to a number of issues, including the prices at which Kohl's intends to sell such products, which is often stated in purchase orders or manufacturing contracts. Plaintiff also clarified that she only seeks responsive documents pertaining to the proposed class period of July 21, 2011 through the date of production.

In response, Kohl's stated that it would consider this request further. To date, no further response has been provided and no responsive documents have been produced.

Defendant's contentions concerning RFP No. 12

The parties have reached a compromise on this Request.

Request For Production No. 35

Documents showing the names and last known home addresses, e-mail, and telephone numbers of all customers who have purchased private or exclusive branded products offered or [sic] at a discounted sale price of 30% or more in Kohl's California Stores during the Relevant Time Period.

Response to Request for Production No. 35

Kohl's hereby incorporates the Preliminary Statement and General Objections. Kohl's further objects that the request is overbroad and unduly burdensome with respect to, among other things, the persons, products, stores, and period for which information is sought. Kohl's further objects that the request seeks information regarding persons, products, stores, and periods, among other things, that is not relevant to any party's claims or defenses and not proportional to the needs of the case. Kohl's further objects to the extent that the request seeks trade-secret or confidential information, as no protective order is in place. Kohl's further agrees that this request is premature and improper as no class has been certified.

Subject to, and without waiving, the foregoing, Kohl's agrees not to contest that numerosity is met for purposes of class certification.

Plaintiff's Contentions with Respect to Defendant's Response to RFP 35

Plaintiff is entitled, as a matter of law, to discover "any non-privileged matter that is relevant to any party's claim or defense…Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute." Fed. R. Civ. P. 26(b)(1); *Duran v. Cisco Sys.*, 258 F.R.D. 375, 378 (C.D. Ca. 2009); *Moon v. SCP Pool Corp*., 232 F.R.D. 633, 636 (C.D. Cal. 2005). "Relevant information for purposes of discovery is information 'reasonably calculated to lead to the discovery of admissible evidence.'" *Withers. V. eHarmony, Inc.*, 267 F.R.D. 316, 319 (C.D. Ca. 2010).

During the meet and confer process, Kohl's counsel admitted that it is in possession of responsive documents. Accordingly, there is absolutely no reasonable justification for its boilerplate objections to this request. The customers who purchased private or exclusive branded products at discounted sale prices during the relevant time period (defined as July 21, 2011 through the date of production) are both putative class members and witnesses to (and victims of) the exact illegal business practices that are at issue in this matter. Further, the requested information (including contact information) is relevant to the commonality, typicality, superiority and predominance elements of Federal Rule 23, as well as to the ability to provide notice should a class be certified.

During the meet and confer process, Kohl's offered to provide a written response "delineating the general types of information Kohl's collects about its customers and their purchases. . . ." Plaintiff responded that this may be an acceptable compromise prior to class certification, but it would depend on the actual details and level of specificity provided. To date, no such written response has been provided.

Defendant's Contentions with Respect to its Response to RFP 35

The parties have reached a compromise on this Request.

IT IS SO STIPULATED.

Dated: January 15, 2016

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Dated: January 15, 2016

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The undersigned hereby certifies pursuant to Local Rule 5-4.3.4 that all signatories listed above concur in the content and have authorized this filing.

Dated: January 15, 2016

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/s/ Matthew J. Zevin

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